STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2013
v	No. 310309 Wayne Circuit Court
MICHAEL LEANORA ORR, Defendant-Appellant.	LC No. 11-012215-FH

Before: SAWYER, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a). The trial court sentenced defendant to three years' probation for the conviction. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant lived with the 13-year-old victim and her family for four years. On the night of September 15, 2010, defendant, the victim, and the victim's three siblings were in the home. The victim's mother and cousin were at work. While in the kitchen, defendant approached the victim, touched her buttock, and kissed her on the neck. The victim exited the kitchen and went into her bedroom. Defendant opened the bedroom door and asked, "[Y]ou're not gonna tell anybody, are you?" The victim replied that she would not, and pretended to go to sleep.

After an indeterminate period of time, and while defendant was showering, the victim left her bedroom, awoke her siblings, and led them out of the house. The victim attempted to call her mother 10 times, but was unsuccessful. At trial, the victim's mother testified that she called the victim back and the victim told her, "Michael tried to rape me." The victim was crying hysterically. The victim also called her aunt, crying, and asked her to come home. The aunt drove to the house and discovered the victim at the end of the driveway with her three siblings. The aunt testified that the victim told her, "Michael tried to rape me." The aunt called the police. Officer Jaime Devoll arrived at the house and questioned the victim about the incident. Devoll testified that the victim was not crying when he spoke with her. Defendant was thereafter arrested. Defendant maintained that he did not touch the victim. At trial, defendant argued that the victim fabricated the allegations at the behest of her mother because the mother wanted defendant out of the home.

II. HEARSAY

Defendant first argues that the victim's statements to her mother and aunt were inadmissible hearsay. We disagree.

To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. *People v Douglas*, 296 Mich App 186, 191; 817 NW2d 640 (2012). Because defendant failed to object to each statement at trial, the issue is unpreserved. This Court's review of defendant's unpreserved claim is limited to plain error affecting defendant's substantial rights. *People v Jones*, 297 Mich App 80, 83; 823 NW2d 312 (2012). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the proceedings. *Id*.

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v Dendel*, 289 Mich App 445, 452; 797 NW2d 645 (2010). Hearsay is generally inadmissible unless it comes within an exception to the hearsay rule, regardless of the declarant's availability to testify. *Id*. Excited utterance is an exception to the hearsay rule. MRE 803(2); *People v McLaughlin*, 258 Mich App 635, 659; 672 NW2d 860 (2003). To qualify as an excited utterance, the statement must be a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id*. "The pertinent inquiry is not whether there has been time for the declarant to fabricate a statement, but whether the declarant is so overwhelmed that she lacks the capacity to fabricate." *Id*. at 659-660. The trial court is given wide discretion in its determination whether the declarant was still under the stress of the event. *People v Smith*, 456 Mich 543, 552; 581 NW2d 654 (1998).

We conclude that the victim's statements to her mother and aunt qualified as excited utterances. On appeal, defendant does not take issue with the fact that incident qualified as a stressful event; rather, he maintains that the statements were uttered a "significant period of time after the alleged exciting event." However, the evidence established that the victim was under the stress of excitement caused by the event when she made the statements. The 13-year-old victim waited to leave her bedroom until defendant entered the shower. The victim gathered her siblings and led them out of the home. The victim called her mother 10 times, to no avail. The mother testified that she returned the victim's phone call and that the victim told her, while crying hysterically, "Michael tried to rape me." The victim then called her aunt, crying, and asked her to come home. The aunt drove to the home and discovered the victim and the three siblings at the end of the driveway. The victim then told the aunt, "Michael tried to rape me." Given that the victim was so overwhelmed that she lacked the capacity to fabricate, the victim's statements to her mother and aunt were admissible as excited utterances under MRE 803(2). See *McLaughlin*, 258 Mich App at 659-660 ("The pertinent inquiry is not whether there has been time for the declarant to fabricate a statement, but whether the declarant is so overwhelmed that

she lacks the capacity to fabricate.") Therefore, defendant has failed to show plain error in the admission of the victim's statements.[1] See *Jones*, 297 Mich App at 83.

III. CRIME VICTIM'S RIGHTS ASSESSMENT

Defendant next contends that requiring him to pay the $130 under the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., violated the constitutional provisions prohibiting the ex post facto laws because the crime was committed before the Michigan Legislature increased the fee from $60 to $130. We disagree.

Defendant failed to raise the issue in the trial court; thus, the issue is unpreserved for review. See *People v Earl*, 297 Mich App 104, 114; 822 NW2d 271 (2012), lv gtd 828 NW2d 359 (2013). This Court's review of defendant's unpreserved claim is limited to plain error affecting defendant's substantial rights. *Jones*, 297 Mich App at 83.

This Court has held that the imposition of the increased CVRA fee for offenses committed before the law's effective date does not violate the constitutional provisions prohibiting ex post facto laws. See *Earl*, 297 Mich App at 114. We decline defendant's request to hold this case in abeyance due to the Michigan Supreme Court's grant of leave to appeal in *Earl*. Moreover, we note that "a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals." MCR 7.215(C)(2).

Affirmed.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly

[1] We note that defendant also argues that the statements were inadmissible as prior consistent statements under MRE 801(d)(1)(B). Regardless, "[t]hat our Rules of Evidence preclude the use of evidence for one purpose simply does not render the evidence inadmissible for other purposes. Rather, the evidence is admissible for a proper purpose, subject to a limiting instruction under MRE 105." *People v Sabin*, 463 Mich 43, 56; 614 NW2d 888 (2000).